

**MEMORANDUM OF UNDERSTANDING BETWEEN
THE TEXAS DEPARTMENT OF TRANSPORTATION
AND THE TEXAS PARKS AND WILDLIFE DEPARTMENT
PROPOSAL PREAMBLE**

1. Introduction.

The Texas Parks and Wildlife Department proposes an amendment to §69.71, concerning Memorandum of Understanding between the Texas Parks and Wildlife Department and the Texas Department of Transportation.

The proposed rule would adopt by reference a proposed Memorandum of Understanding (MOU) between the Texas Parks and Wildlife Department (TPWD) and the Texas Department of Transportation (TxDOT) concerning transportation projects and highway improvement projects ("TxDOT construction projects" or "projects").

Transportation Code, §201.607, requires TxDOT to adopt an MOU with each state agency that has responsibility for the protection of the natural environment, which includes TPWD. Among other things, this MOU must address "the responsibilities of each agency entering into the memorandum relating to the review of the potential environmental . . . effect of a highway project." Transportation Code, §201.607, also requires TxDOT to adopt the memoranda and all revisions by rule and to examine and revise the memoranda every five years. In addition, §201.607 requires each agency that is a party to the MOU to adopt revisions to the MOU by rule.

Under Parks and Wildlife Code, §12.0011, TPWD is the state agency with primary responsibility for protecting the state's fish and wildlife resources. This section also requires TPWD to provide "recommendations that will protect fish and wildlife resources to local, state, and federal agencies that approve, permit, license, or construct developmental projects" and to provide "information on fish and wildlife resources to any local, state, and federal agencies or private organizations that make decisions affecting those resources."

The proposed MOU is intended to implement the statutory obligations of both

TxDOT and TPWD regarding review of projects covered by the MOU for impacts to natural resources.

The current MOU between TPWD and TxDOT (43 TAC §2.22) provides for TPWD review of TxDOT projects that have the potential to affect natural resources within the jurisdiction of TPWD. However, the current MOU between TPWD and TxDOT is outdated and in need of revision. In accordance with Transportation Code, §201.607, TPWD and TxDOT have examined the current MOU and have developed a proposed new MOU. The proposed new MOU was published by TxDOT in the October 9, 2009, issue of the Texas Register (34 TexReg 7050). A section-by-section summary of the proposed MOU is included in the preamble to the TxDOT proposal as published in the October 9, 2009, issue of the Texas Register (34 TexReg 7050). The following is intended to provide additional explanation and background regarding the proposed MOU.

The proposed new MOU continues the required review process with some modifications. In addition to changes necessary to update the agencies' organizational structures and provide additional details, the primary differences between the current MOU and the proposed new MOU concern identification of the projects to be reviewed and compensation for impacts to natural resources.

TPWD and TxDOT recognize that some TxDOT projects are of a size and nature that the individual review of those projects by TPWD may not be time and cost effective, and that those projects may be appropriately mitigated for in the aggregate. Therefore, §2.106 of the proposed MOU lists the types of projects that must be reviewed by TPWD. It is the agencies' intent that this provision will reduce the number of projects that are required to be reviewed by TPWD, thus reducing the time and costs associated with those projects.

With regard to mitigation, under the proposed MOU, TxDOT and TPWD agree that mitigation for impacts to natural resources should be through avoidance, minimization and compensation, in that order of preference. Therefore, in seeking TPWD review of projects, TxDOT will describe its actions to mitigate impacts on natural resources and TPWD will provide advice and assistance in designing TxDOT

construction plans or agreements to mitigate impacts to natural resources. TxDOT will then describe the mitigation proposal in the project's environmental document upon mutual agreement with TPWD. Mitigation will be included if mutually agreed to by TxDOT and TPWD.

The MOU also provides for payments to be made to TPWD by TxDOT to compensate for impacts to unregulated fish and wildlife resources. The term "unregulated resources" is defined in §2.104 of the proposed MOU as state fish and wildlife resources that are not "regulated resources." "Regulated resources" are defined in the proposed MOU as "state fish and wildlife resources that when impacted by a transportation project may require mandatory mitigation as directed by federal law, including but not limited to mitigation directed by the United States Army Corps of Engineers under the Clean Water Act, §404 (26 U.S.C. §1344), concerning impacts to waters of the United States, or as directed by the United States Fish and Wildlife Service under the Endangered Species Act (16 U.S.C. §1531 et seq.) concerning impacts to federal threatened or endangered species." Examples of unregulated resources include bottomland hardwood forests, isolated wetlands (that are not federally regulated), and prairies.

Transportation Code, §201.617 authorizes TxDOT to mitigate impacts to all state fish and wildlife resources, including unregulated resources, and specifically authorizes TxDOT, in connection with such mitigation, to make a payment to an appropriate public agency, which would include TPWD. Under Transportation Code, §222.001(2), money required to be used for public roadways by the Texas Constitution or federal law and that is deposited in the state treasury to the credit of the state highway fund, including money deposited to the credit of the state highway fund under Title 23, United States Code, relating to highways, may be used to mitigate adverse environmental effects that result directly from construction or maintenance of a state highway.

Environmental resources that are not "unregulated" are compensated for through federal processes. As a result, there would be no change in requirements for assessment and mitigation of impacts to federally regulated resources such as wetlands and

endangered species habitat.

Under the proposed MOU, on a quarterly basis, TxDOT will provide estimated compensation for future projects. The compensation amount will be based on the volume of project lettings and on agreed upon rates specific to the categories of the projects. The proposed MOU provides for an interim compensation method to be implemented under which payments are based on the dollar amount of contracts entered into by TxDOT. The amount paid will be a percentage of the contract amount, with the percentage factor to be agreed upon between TxDOT and TPWD. At the end of each fiscal year, TxDOT will calculate actual impacts to resources, based on acreage and habitat type, and calculate compensation based on agreed-upon rates. These rates are set forth in Figure 43 TAC §2.109(c)(4)(A) of the proposed MOU and are structured to encourage the avoidance of high value resources, such as riparian areas. After calculating the actual impacts, TxDOT will reconcile the monetary difference between the amount of compensation paid in the estimated quarterly payments and the calculated amount for the actual annual impact from completed projects. Upon completion of the calculation, if the actual impacts are greater than or less than the payments made by TxDOT, then TPWD will refund and/or TxDOT will make additional payments, as necessary, to ensure that the final amount paid by TxDOT equals the actual impacts.

As noted above, under the proposed MOU, TxDOT will first seek to avoid and minimize impacts to both regulated and unregulated resources. Avoidance and minimization will reduce the amounts paid by TxDOT for mitigation for unregulated resources. Under proposed §2.110 of the MOU, TxDOT and TPWD will work together to implement a final methodology which calculates mitigation payments based on acreage.

The funds paid to TPWD under the proposed rule are intended to achieve significant conservation benefits by aggregating compensatory mitigation into larger regional projects, rather than smaller project-by-project mitigation. TPWD will apply mitigation funds to achieve the greatest benefits on an eco-regional basis. Therefore,

although mitigation, such as acquisition or protection of state fish and wildlife resources, will not be handled on a project-by-project basis, the intent is that such mitigation will occur in the same ecoregion as the area impacted by the project.

The agencies estimate that the savings realized from forgoing TPWD's review of small projects will roughly offset the financial cost of "unregulated resource" mitigation compensation. TxDOT and TPWD intend to assemble an interagency team to spot check the accuracy of TxDOT budget and impact estimates, review "small project" ledgers and review habitat characterizations to be sure they are useful for categorizing project impacts to state fish and wildlife resources. The agencies agree that the MOU will reduce the net regulatory burden and delay for many projects as well as reduce the net loss of wildlife habitat associated with highway project implementation in Texas.

Therefore, the intended benefits of the proposed MOU include the reduction of costs associated with project-by-project environmental review for smaller projects and enhanced protection of the state's fish and wildlife resources.

2. Fiscal Note.

Mr. Ted Hollingsworth, Director of Land Conservation, has determined that for each of the first five years that the rule as proposed is in effect, there will be fiscal implications to TPWD as a result of enforcement or administration of the rule. Under the terms of the proposed MOU, TxDOT will make payments to TPWD for unregulated impacts to natural resources resulting from certain TxDOT projects. The compensation paid to TPWD will be based on the habitat types affected by each TxDOT project and, based on historical construction project data, is estimated by TxDOT to be approximately \$3 million for each year the MOU is in effect. There will be no fiscal implications for other units of state or local government.

3. Public Benefit/Cost Note.

Mr. Hollingsworth also has determined that for each of the first five years the rule as proposed is in effect:

(A) The public benefit anticipated as a result of enforcing or administering the rule by TPWD as proposed will be the ability of TPWD to provide additional protection of natural resources and habitat.

(B) Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. TPWD has determined that there will be no direct economic effect on small or micro-businesses or persons required to comply as a result of the proposed rule. The rule would not compel or mandate any action on the part of small businesses or micro-businesses. In particular, the proposed rule would not add new reporting or recordkeeping requirements; require any new professional expertise, capital costs, or costs for modification of existing processes or procedures; lead to loss of sales or profits; change market competition; or increase taxes or fees. Accordingly, TPWD has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006.

(C) TPWD has not drafted a local employment impact statement under the Administrative Procedures Act, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

(D) TPWD has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

(E) TPWD has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

4. Request for Public Comment.

Comments on the proposed rule may be submitted to Ann Bright, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas, 78744; (512) 389-8558 (e-mail: ann.bright@tpwd.state.tx.us).

5. Statutory Authority.

The rule is proposed under the authority of Transportation Code, §201.607, which

requires TPWD to adopt by rule a memorandum of understanding with the Texas Department of Transportation and each state agency that is responsible for the protection of the natural environment or for the preservation of historical or archeological resources.

The proposed rule affects Transportation Code, Chapter 201.

§69.71. Memorandum of Understanding between the Texas Parks and Wildlife Department and the Texas Department of Transportation. The Texas Parks and Wildlife Commission adopts by reference the provisions of 43 TAC §§2.109 - 2.112~~§2.22~~ (relating to Memorandum of Understanding with the Texas Parks and Wildlife Department).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on